Jak Kwang Builders & Developers Sdn Bhd v Ng Chee Keong & Ors

HIGH COURT (KUCHING) — SUIT NO 22–48 OF 2000–III/II
ZAKARIA SAM JC
5 SEPTEMBER 2001

Civil Procedure *— Injunction — Interim injunction — Injunction to restrain defendants from proceeding with arbitration proceedings — Whether arbitration had commenced when plaintiff issued first suit — Whether issues were already sub judice*

Civil Procedure *— Res judicata — Issues, similarity of — Two suits filed by plaintiff — Whether relief prayed for in second suit could have been brought up in first suit and be disposed of accordingly — Whether substantial duplication of issues and relief sought — Whether facts and plaintiff's cause of action in second suit arose only after filing of first suit relief — Whether parties had to be the same for res judicata to apply*

The plaintiff appointed the third defendant ('D3') as its contractor to construct a building. D3 determined its obligations under the building contract on the grounds that it had not been paid by the plaintiff. The building contract stipulated that all disputes or differences arising thereunder shall be referred to arbitration and after the determination of the building contract, D3 wrote to the plaintiff vide a letter dated 7 October 1999, giving notice of intention to refer the dispute to arbitration and proposed the names of two arbitrators. On 20 October 1999, the plaintiff replied that it was not agreeable to the appointment of any of the named arbitrators but did not object to D3's intention to refer the dispute to arbitration. Although the plaintiff indicated that it would nominate an arbitrator of its own choice, it did not do so and consequently, D3, through its solicitors, requested the president of Pertubuhan Akitek Malaysia ('PAM') or the second defendant ('D2') to appoint an arbitrator. The plaintiff subsequently retracted its letter of 20 October 1999 and following that, the plaintiff commenced an action against D3 as the sole defendant at the High Court of Kuching ('the first suit'), and sought, inter alia, for a declaration that the termination of the building contract by D3 was invalid. D3 filed an application pursuant to s 6 of the Arbitration Act 1952 ('the Act') to stay the proceedings under the first suit so that the disputes could be referred to arbitration. The deputy registrar allowed D3's application. In the meantime, D2 appointed the first defendant ('D1') as the arbitrator. Two meetings were called by D1 but the plaintiff refused to attend on the grounds that the matter was sub judice. On 3 May 2000, the plaintiff commenced an action against D1, D2 and D3 ('the second suit') and prayed, inter alia, for the declaration that the purported appointment of D1 as arbitrator was invalid and improper. In respect of the second suit, the plaintiff applied, by way of summons in chambers ('the present application'), for, inter alia: (a) an order of interim injunction to restrain D1, D2 and D3 from proceeding with the arbitration until the final disposal of the second suit; (b) an order

of interim injunction to restrain the D1 from taking any action and/or conducting himself as an arbitrator until the disposal of the second suit.

Held, dismissing the application:

(1) Notice of arbitration was given by D3 before the first suit was filed and the plaintiff should have anticipated that D3 would pursue its cause by way of arbitration. Furthermore, the plaintiff knew that D3's solicitors had written to D2 to request that an arbitrator be appointed by D2. Despite the information, the plaintiff deemed it fit not to file any interlocutory application against D3 in the first suit. Had the plaintiff filed an interlocutory application to restrain D3 from pursuing with the arbitration proceedings, the second suit could have been easily avoided. This would have had the desired effect without even involving D1 and D2. As such, the contention that by virtue of the doctrine of relation back, the issues in the second suit could not be properly adjudicated in the first suit as the facts and the plaintiff's cause of action in the second suit arose only after the filing of the first suit was not sustainable (see pp 398H–399E); *Simetech (M) Sdn Bhd v Yeoh Cheong Liam Construction Sdn Bhd* [1992] 1 MLJ 11 and *Sip Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 distinguished.

(2) The relief prayed for in the second suit could have been brought up in the first suit and be disposed of accordingly. Even though D1 and D2 were not parties in the first suit, the crux of the matter in the second suit, where the intention of the plaintiff was to stop the arbitration from proceeding, effectively amounted to substantial duplication of issues and relief sought in the first suit and for res judicata to apply, the parties need not be the same (see pp 399G, 400B); *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 followed.

(3) D3 gave notice of arbitration to the plaintiff in D3's letter dated 7 October 1999. Arbitration had commenced at that point in time. As such, when the plaintiff issued the first suit, the issues were already sub judice (see pp 400I–401A).

(4) The building contract clearly provided for arbitration proceedings. As such, the question of sub judice did not arise in respect of the arbitration proceedings as the same had commenced before the first suit was filed. Furthermore, since D1 had not acted in contravention of any court order or direction, the contention of contempt of court was devoid of merit. A person cannot be in contempt of court unless the act of omission was in defiance of an order of the court and the only way that the arbitration proceedings could be restrained was by a judge of the High Court issuing an appropriate order for injunction against D3. In the instant case, there was no such order issued by the court (see pp 401A–B, E–F).

(5) It was not proper for the plaintiff to file two suits arising out of one cause of action as it was tantamount to an abuse of the process of the court and could cause embarrassment to all parties involved, including the court (see p 401G); *Alloy Automative Sdn Bhd v Perusahaan Iron Sdn Bhd* [1986] 1 MLJ 382 distinguished.

[**Bahasa Malaysia summary**

Plaintif melantik defendan ketiga ('D3') sebagai kontraktornya untuk membina sebuah bangunan. D3 memutuskan obligasinya di bawah kontrak pembinaan berdasarkan alasan bahawa ia telah tidak dibayar oleh plaintif. Kontrak pembinaan menetapkan bahawa semua pertikaian atau perbezaan yang berbangkit darinya haruslah dirujuk kepada timbangtara dan selepas pemberhentian kontrak pembinaan tersebut, D3 menulis kepada plaintif menerusi sepucuk surat bertarikh 7 Oktober 1999, memberi notis tentang hasrat untuk merujuk pertikaian kepada timbangtara dan mencadangkan nama dua orang penimbang tara. Pada 20 Oktober 1999, plaintif menjawab bahawa ia tidak bersetuju dengan perlantikan mana-mana satu penimbang tara tersebut tetapi tidak membantah kepada hasrat D3 untuk merujuk pertikaian keapda timbang tara. Walaupun plaintif menyatakan bahawa ia akan melantik seorang penimbang tara pilihannya sendiri, ia tidak berbuat demikian dan akibatnya, D3, melalui peguamcaranya, meminta presiden Pertubuhan Akitek Malaysia atau defendan kedua ('D2') supaya melantik seorang penimbang tara. Plaintif kemudiannya menarik balik suratnya bertarikh 20 Oktober 1999 dan berikutnya, plaintif memulakan tindakan terhadap D3 sebagai defendan tunggal di Mahkamah Tinggi Kuching ('guaman pertama'), dan memohon, antara lain, satu perisytiharan bahawa pemberhentian kontrak pembinaan oleh D3 adalah tak sah. D3 memfailkan satu permohonan menurut s 6 Akta Timbang Tara 1952 untuk menggantung prosiding di bawah guaman pertama supaya pertikaian-pertikaian boleh dirujuk kepada timbang tara. Timbalan pendaftar membenarkan permohonan D3. Sementara itu, D2 melantik defendan pertama ('D1') sebagai penimbang tara. Dua mesyuarat telah dipanggil oleh D1 tetapi plaintif enggan menghadirinya dengan alasan perkara tersebut adalah sub judice. Pada 3 Mei 2000, plaintif memulakan satu tindakan terhadap D1, D2 dan D3 ('guaman kedua') dan memohon, antara lain, satu perisytiharan bahawa perlantikan D1 sebagai penimbang tara adalah tak sah dan tidak betul. Berhubung dengan guaman kedua, plaintif memohon, melalui saman dalam kamar, antara lain: (a) satu perintah injunksi interim bagi menahan D1, D2 dan D3 daripada meneruskan timbang tara sehingga penyelesaian muktamad guaman kedua; (b) satu perintah injunksi interim untuk menahan D1 daripada mengambil apa-apa langkah dan/atau berkelakuan sebagai seorang penimbang tara sehingga penyelesaian guaman kedua.

Diputuskan, menolak permohonan tersebut: A

(1) Notis timbang tara diberikan oleh D3 sebelum guaman pertama difailkan dan plaintif seharusnya menjangkakan D3 akan meneruskan kausanya melalui timbang tara. Tambahan pula, plaintif tahu bahawa peguamcara D3 telah menulis kepada D2 untuk meminta supaya seorang penimbang tara dilantik oleh D2. B Walaupun dengan maklumat tersebut, plaintif menganggapnya sesuai untuk tidak memfailkan apa-apa permohonan interlokutori terhadap D3 dalam guaman pertama. Andainya plaintif telah memfailkan satu permohonan interlokutori untuk menahan D3 daripada meneruskan prosiding timbang tara, guaman kedua C seharusnya boleh dielakkan dengan mudah. Ini akan memberikan kesan yang diinginkan tanpa keperluan untuk melibatkan D1 dan D2 sama sekali. Oleh yang demikian, hujah bahawa disebabkan doktrin kebelakangan, isu-isu dalam guaman kedua tidak boleh dihakimkan dengan wajarnya dalam guaman pertama kerana fakta-fakta dan kausa tindakan plaintif dalam guaman kedua D hanya berbangkit selepas pemfailan guaman pertama didapati tidak boleh dikekalkan (lihat ms 398H–399E); *Simetech (M) Sdn Bhd v Yeoh Cheong Liam Construction Sdn Bhd* [1992] 1 MLJ 11 dan *Sip Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 dibeza.

(2) Relief yang dipohon dalam guaman kedua sepatutnya diungkitkan dalam guaman pertama dan diputuskan sewajarnya. Meskipun E D1 dan D2 tidak merupakan pihak-pihak dalam guaman pertama, teras perkara dalam guaman kedua, di mana hasrat plaintif adalah untuk mencegah timbang tara daripada diteruskan, sama seperti ulangan asas isu-isu dan relief yang dipohon dalam guaman pertama dan untuk membolehkan res judicata terpakai, F pihak-pihak tidak semestinya sama (lihat ms 399G, 400B); *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 diikut.

(3) D3 telah memberi notis timbang tara kepada plaintif dalam surat D3 bertarikh 7 Oktober 1999. Timbang tara telah pun bermula pada ketika itu juga. Dengan itu, apabila plaintif mengeluarkan guaman pertama, isu-isu tersebut telah pun menjadi sub judice G (lihat ms 400I–401A).

(4) Kontrak pembinaan jelas memperuntukkan prosiding timbang tara. Dengan itu, soalan tentang sub judice tidak berbangkit berhubung dengan prosiding timbang tara kerana yang sama telah bermula sebelum guaman pertama difailkan. Tambahan pula, H oleh kerana D1 tidak bertindak bertentangan dengan mana-mana perintah atau arahan mahkamah, hujah tentang penghinaan mahkamah adalah tanpa merit. Seseorang tidak dikatakan menghina mahkamah melainkan perbuatan peninggalan tersebut mengingkar satu perintah mahkamah dan satu-satunya cara di mana prosiding timbang tara boleh disekat adalah sekiranya I seorang hakim Mahkamah Tinggi mengeluarkan satu perintah yang wajar untuk injunksi terhadap D3. Dalam kes ini, tiada

perintah sedemikian yang dikeluarkan oleh mahkamah (lihat ms 401A–B, E–F).

(5) Adalah tidak betul untuk plaintif memfail dua guaman yang berbangkit daripada satu kausa tindakan kerana ia sama sahaja dengan satu penyalahgunaan proses mahkamah dan boleh menyebabkan keresahan kepada semua pihak yang terlibat, termasuk mahkamah (lihat ms 401G); *Alloy Automative Sdn Bhd v Perusahaan Iron Sdn Bhd* [1986] 1 MLJ 382 dibeza.]

Notes

For cases on interim injunction generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2626–2706.

For cases on similarity of issues in res judicata cases, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5152–5156.

Cases referred to

Alloy Automative Sdn Bhd v Perusahaan Iron Sdn Bhd [1986] 1 MLJ 382 (distd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 5 MLJ 137 (refd)

Lai Kim Loi v Dato Lai Fook Kim & Anor [1989] 2 MLJ 290 (folld)

OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 (refd)

Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1988] 2 MLJ 20 (refd)

Simetech (M) Sdn Bhd v Yeoh Cheong Liam Construction Sdn Bhd [1992] 1 MLJ 11 (distd)

Sip Koon Lin & Anor v SB Mehra [1981] 1 MLJ 225 (distd)

Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713 (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

Legislation referred to

Arbitration Act 1952 ss 6, 25(1), (2)

Judicature Act 1964, Schedule para 11

Chong Siew Chang (*Chong Brothers*) for the plaintiff.
Christina J Eng (*CJ Eng*) for the first and second defendants.
Stanley Eddy (*Bettenberg & Talma*) for the third defendant.

Zakaria Sam JC:

Background

By a building contract ('the contract') entered between the plaintiff and the third defendant on 22 November 1996, the plaintiff appointed the third

defendant as the contractor, to carry out and to complete the construction of the proposed 15 storey condominium project at Lot 2855 Muara Tebas Land District, Ulu Sg Stutong, Kuching.

Works came to a halt on the site around the end of August 1999. The third defendant purportedly determined its obligations under the contract on 19 August 1999, alleging non-payment by the plaintiff. The plaintiff rejected that determination and then gave its own termination notice to the third defendant vide its letter dated 10 September 1999 based, inter-alia, on the breaches of the contract by the third defendant pursuant to cl 25(1) therein for failing to remedy the default specified by the architect.

Clause 34 of the contract stipulates that all disputes or differences arising thereunder or in connection with the contract shall be referred to arbitration.

On 7 October 1999, the third defendant wrote to the plaintiff giving notice of intention to refer the disputes to arbitration and proposed two names that could be appointed as arbitrators. The plaintiff responded on 20 October 1999, pointing out that the two names proposed by the third defendant were not agreeable, but did not object to the third defendant's intention to refer the said disputes or differences to arbitration. The plaintiff indicated that it would nominate an arbitrator of its own choice within 14 days therefrom. The plaintiff never made such nomination at all. Consequently, pursuant to cl 34 of the contract, solicitors for the third defendant wrote to the President of Pertubuhan Arkitek Malaysia ('PAM') on 11 November 1999, requesting his good office to appoint an arbitrator.

On 15 November 1999, the plaintiff, through its solicitors, retracted its letter dated 20 October 1999, citing that the letter was issued without the benefit of legal advice.

Following that, on 14 December 1999, the plaintiff commenced an action against the third defendant herein as the sole defendant vide High Court Kuching Suit No 22–255–99–III (1) ('the first suit'), inter alia, for the following orders:

(i) a declaration that the termination of the contract by the third defendant is invalid, given unreasonably and/or vexatiously;

(ii) a declaration that the third defendant's employment under the contract was validly terminated by the plaintiff vide the plaintiff's letter dated 10 September 1999;

(iii) a declaration that any claim by the defendant would be premature until cl 25(3) of the contract is fulfilled; and

(iv) an Order that all actions to refer the matter for arbitration be stayed until the determination of (i), (ii) and (iii) above.

On 6 January 2000, the third defendant entered a conditional appearance, and on 19 January 2000, an application was filed pursuant to s 6 of the Arbitration Act 1952 ('the Act'), to stay the proceedings therein so that the disputes could be referred to arbitration.

In the meantime, on 24 February 2000, the second defendant (President of PAM) appointed the first defendant as the arbitrator. Two meetings were called by the first defendant, but on both occasions, the plaintiff refused to attend on the ground that the matter was subjudiced.

On 13 April 2000, the plaintiff served an amended statement of claim on the third defendant. The principal reason for the amendment was to bring in an allegation of fraud against the third defendant.

Present suit ('the second suit')

On 3 May 2000, the plaintiff commenced an action before this court ('the second suit') against the first, second and third defendants by way of writ of summons, praying, inter alia, for the following orders and declarations:

(i) a declaration that the purported appointment of the first defendant as 'arbitrator' is invalid and improper;

(ii) that any directions purportedly issued by the first defendant in the purported arbitration are invalid, null and void;

(iii) an injunction to restrain the defendants from proceeding with the purported arbitration;

(iv) an injunction to restrain the first defendant from taking any action and/or conducting himself purportedly as 'arbitrator' with respect to the 'disputes' alleged by the third defendant;

(v) alternatively,

(a) since the issue of fraud is involved, that leave of the court be granted to revoke the authority of the first defendant pursuant to s 25(2) of the Act; and/or

(b) since the first defendant may not be impartial, that leave of the court be granted to revoke the authority of the first defendant pursuant to s 25(1) of the Act; and

(c) an injunction to restrain the defendants from proceeding with the purported arbitration.

Present application

In respect of the second suit, the plaintiff had, on 8 May 2000, taken out an application by way of summons in chambers (encl 6) applying for the following reliefs:

(a) an order for an interim injunction to restrain the first, second and third defendants from proceeding with the arbitration of disputes alleged by the third defendant pursuant to the contract dated 22 November 1996, until the final disposal of the action herein upon the plaintiff's usual undertaking as to damages;

(b) an order for an interim injunction to restrain the first defendant from taking any action and/or conducting himself purportedly as an arbitrator with respect to the disputes alleged by the third defendant

pursuant to the contract dated 22 November 1996 until the final disposal of the action herein upon the plaintiff's usual undertaking as to damages;

(c) costs against the defendants; and

(d) such further and/or other reliefs as this honourable court thinks fit.

The basis of this application can be summarized as follows:

(a) the plaintiff had commenced a suit which is the first suit against the third defendant on 14 December 1999, which included, amongst others, an allegation of fraud;

(b) in the light of the first suit, the matter is subjudice and the second defendant could not appoint the first defendant as an arbitrator. As such, the first defendant could not proceed with the arbitration proceedings; and

(c) the first defendant may not be impartial.

This is the application that is currently before this court.

In the meantime, the Deputy Registrar of High Court, on 26 August 2000, allowed the application of the third defendant to stay the proceedings of the first suit pursuant to s 6 of the Act 1952 to enable the disputes between the parties be determined by arbitration. The appeal to the judge in chambers in respect of that decision is still pending.

The issues

Doctrine of relation back

The learned counsel for the plaintiff argued that the second suit concerned events which occurred after the first suit was filed. Because of the doctrine of relation back, the issues in the second suit could not properly be adjudicated in the first suit since the facts and the plaintiff's cause of action herein against the defendant arose after the filing of the first suit. The learned counsel for the plaintiff cited two authorities *Simetech (M) Sdn Bhd v Yeoh Cheong Liam Construction Sdn Bhd* [1992] 1 MLJ 11 and *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 to support his argument. Both authorities relate to applications for amendment where the cause of action proposed in the amendment arose after the filing of the suit in question, and the amendment would give rise to a new cause of action which did not exist at the time of the filing of the writ.

Facts of both authorities are distinguishable from the second suit. Here, when the plaintiff filed its first suit, it should have anticipated that the third defendant would pursue its cause by way of arbitration. Notice of arbitration had been issued on 7 October 1999 which was two months before the first suit was filed. It was clearly within the plaintiff's knowledge that the solicitors acting for the third defendant wrote to the second defendant on 11 November 1999, requesting that an arbitrator be appointed by him. Notwithstanding the request of the third defendant

herein, the plaintiff deemed it fit not to file any interlocutory applications against the third defendant in the first suit.

Had the plaintiff filed an interlocutory application against the third defendant for an injunction restraining the third defendant from pursuing with the proceedings under arbitration, it would inevitably resolve the situation, and the second suit could have been easily avoided. At all material times, the dispute was between the plaintiff and the third defendant only. It must be remembered that the appointment by the second defendant of the first defendant as arbitrator was upon the valid request of the third defendant before the issuance of the first suit.

I am of the view that upon the commencement of the first suit, the door was still open to the plaintiff to file an interlocutory application in the first suit to stop the arbitration. The present application for injunction against the first and second defendants was totally unnecessary, as an injunction could have been obtained in the first suit against the third defendant, if the merits of the case so warrant. This would have had the desired effect without even involving the first and second defendants.

After all, it is one of the prayers of the plaintiff in the first suit that all actions to refer the matter for arbitration be stayed until the determination of the other reliefs prayed for in the first suit. The cause of action for injunctive reliefs is already available in the first suit. Thus, it is my considered opinion that the plaintiff's contention on the applicability of the doctrine of relation back is unsustainable.

Multiplicity of proceedings and res judicata

The notice of arbitration was issued on 7 October 1999. The plaintiff subsequently filed the writ in the first suit on 14 December 1999. As I have explained earlier in this judgment, in one of the prayers in the first suit, the plaintiff requested that all actions to refer the matter for arbitration be stayed until the determination of the other reliefs prayed therein. No interlocutory application has been filed by the plaintiff for stay of all actions to refer the matter for arbitration in the first suit. It is abundantly clear that the effect of such reliefs, if applied for by the plaintiff in the first suit, would be tantamount to a restraining order as prayed for in the present suit.

Essentially, the reliefs prayed for in the present suit could have been brought up in the first suit and be disposed of accordingly. At the pain of repeating myself, the interlocutory application for stay should have been made in the first suit. In furtherance thereto, an order for stay of proceedings (on the application of the third defendant) pursuant to s 6 of the Act, has been granted by the court in the first suit.

In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, the Privy Council held that the doctrine of res judicata in its widest sense applied and it could be an abuse of the process of court to raise in subsequent proceeding matters which could and should have been litigated in the earlier proceedings (see also *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544; *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn*

Bhd [1995] 3 MLJ 189). The Supreme Court in *Lai Kim Loi v Dato Lai Fook Kim & Anor* [1989] 2 MLJ 290 held that although issues raised and reliefs sought are not totally similar, yet the substantial duplicity of issues and reliefs sought amounted to multiplicity of actions, and in all circumstances an abuse of the process of the court.

Even though the first and second defendants are not parties in the first suit, the crux of the matter in the second suit, where the intention of the plaintiff is to stop the arbitration from proceeding, effectively amounts to a substantial duplication of issues and reliefs sought in the first suit. For res judicata to apply, parties need not be the same (see *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713).

Undoubtedly, the final disposal of the first suit would effectually render the substantial basis of the second suit nugatory. Moreover, the grounds of the first suit formed the main basis of the plaintiff's present application for an interim injunction against all the defendants. Even though the plaintiff had raised the issue of fraud in the second suit, this is also a mere repetition of the plaintiff's allegation in the first suit. As such, there is nothing new pleaded here that had not been pleaded by the plaintiff in the first suit.

It is not disputed that the rationale or basis of the plaintiff's first suit and the second suit is to restrain the third defendant from proceeding with the arbitration. Beside the doctrine of relation back (which I have ruled earlier to be not applicable herein), the plaintiff gave no other explanation as to why it was thought fit to bring two actions instead of one.

It is also pertinent to note that the rule against multiplicity of proceedings is provided for in the Courts of Judicature Act 1964, para 11 of the schedule thereof.

Subjudice

It is the contention of the plaintiff that all the defendants had proceeded in the purported arbitration without due regard to the Kuching High Court's determination of the first suit. The second defendant had appointed the first defendant as an arbitrator although the plaintiff placed the second defendant on prior notice of the existence of the first suit. That, despite various notices given to the first defendant of the subjudice rule, the first defendant had purportedly taken steps to proceed with the arbitration. The plaintiff also claimed that the first defendant would not be impartial. The plaintiff further contended that the appointment of the first defendant by the second defendant is invalid. The plaintiff also submitted that the third defendant is guilty of participating in the directives issued by the first defendant purportedly as arbitrator. The plaintiff further argued that the conduct of the first, second and third defendants would clearly offend the subjudice rule and is calculated to interfere with the course of justice and amounts to contempt of court.

It must be emphasized that by a letter dated 7 October 1999, the third defendant gave notice of arbitration to the plaintiff. At that point of time, arbitration had commenced (see *Sarawak Shell Bhd v PPES Oil & Gas Sdn*

Bhd & Ors [1988] 2 MLJ 20). When the plaintiff issued the first suit on 14 December 1999, the issues were already subjudice. I must agree with the submission of Mr Stanley Eddy and Ms CJ Eng, counsel for the defendants, that the issue of the writ did not make them any more subjudice.

More importantly, cl 34(1) of the contract clearly provides for arbitration proceedings. The question of subjudice does not arise as the third defendant is merely exercising his right provided for under the said clause to refer the matter to arbitration, which commenced prior to the first suit being filed.

The first defendant was appointed by the second defendant (as President of PAM) pursuant to cl 34 of the contract entered into between the plaintiff and the third defendant. At that point of time, there was no order obtained by the plaintiff to restrain the said appointment, neither has the plaintiff obtained any order to stay the arbitration proceedings.

It is also my finding that the plaintiff failed to adduce any evidence of partiality on the part of the first defendant as an arbitrator (see *Kuala Ibai Development Sdn Bhd v Kumpulan Perunding (1988) Sdn Bhd & Anor* [1999] 5 MLJ 137). On this point, I must concur with the submission of Ms CJ Eng, counsel for the first defendant, that the first defendant was duly appointed by the second defendant in accordance with the Act and the PAM Arbitration Rules. The first defendant did not know the contents of the first suit, and convened the meetings between the parties as a duly appointed arbitrator, to hear and put on record parties' respective views or objections in respect of the arbitration. Furthermore, he has not acted in contravention of any court order or direction.

A person cannot be in contempt of court unless the act or omission is in defiance of an order of the court. The only way that the arbitration proceedings could be restrained is by a judge of the High Court issuing an appropriate order for injunction against the third defendant. There was no such order issued by the court.

Therefore, the contention of subjudice or contempt of court is clearly devoid of merit.

I am also of the opinion that it is not proper for the plaintiff to file two suits arising out of one cause of action as it would be tantamount to an abuse of the process of the court and also, it could cause embarrassment to all the parties involved, including the court. What would be the effect if this court allows the plaintiff's present application (ie to restrain the arbitration proceeding), whilst the High Court which dealt with the first suit had already issued an order to stay the proceeding of the first suit and to proceed with the arbitration? Justice demands that all related facts, as far as possible, be laid before one court to enable the court to properly evaluate the facts and to reach a just and fair decision.

Other issue

The learned counsel for the plaintiff also submitted that the second and third defendants have failed to file any affidavit in reply to the plaintiff's

application for injunction and therefore the averment in the affidavit is deemed admitted or accepted as laid down by the case of *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382. But this application involved mainly question of laws, which could easily be dealt with by way of submission. The above authority is not applicable to the facts of this case.

Conclusion

On the grounds stated above, I find that there is no basis to issue an interim injunction against the defendants. In any event, the order, if issued, would be redundant as the first defendant has indicated that he would not want to continue as an arbitrator, and further there is a stay of proceedings granted in the first suit.

It is also to be noted that it is not part of the plaintiff's application herein for an order to remove the appointment of the first defendant, so the question as to the removal or partiality of the first defendant is a non-issue in the present application.

In the upshot, the plaintiff's application is hereby dismissed. Costs to the defendants.

Application dismissed.

Reported by Lim Lee Na